

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA**

ALLAN SMITH,

Petitioner,

v.

Civil Action No. 2:06cv121

DOMINIC A. GUTIERREZ,

Respondent.

ORDER

It will be recalled that on July 17, 2007, Magistrate Judge James E. Seibert filed his Report and Recommendation, wherein the parties were directed, in accordance with 28 U.S.C. § 636(b)(1), to file with the Clerk of Court any written objections within ten (10) days after being served with a copy of the Report and Recommendation. No objections to the Magistrate Judge's Report and Recommendation have been filed.

Upon examination of the report from the Magistrate Judge, it appears to the Court that the issues raised by the Petitioner in his Petition, filed pursuant to 28 U.S.C. §2241, wherein Petitioner seeks an order directing the Bureau of Prisons ("BOP) to transfer him to a Community Corrections Center ("CCC") for the last six months of his term of imprisonment, were thoroughly considered by Magistrate Judge Seibert in his Report and Recommendation, as was the Respondent's Motion to Dismiss.

Moreover, the Court, upon an independent de novo consideration of all matters now before it, is of the opinion that the Report and Recommendation accurately reflects the law applicable to the facts and circumstances before the Court in this action. As more fully set forth in Magistrate Judge Seibert's Report and Recommendation, the Court finds that the BOP's regulations are invalid to the extent that they limit placement in a CCC to the lesser of 10% of the sentence or six months without consideration of the five factors

set forth in 18 U.S.C. §3621(b). The Court therefore finds that, while the Petitioner is entitled to have his CCC placement considered in accordance with the five factors set forth in 18 U.S.C. §3621(b), he is not entitled to an Order directing the BOP to immediately transfer him to a CCC. Therefore, it is

ORDERED that Magistrate Judge Seibert's Report and Recommendation be, and the same hereby is, accepted in whole and that this civil action be disposed of in accordance with the recommendation of the Magistrate Judge. Accordingly, it is

ORDERED that Respondent's Motion to Dismiss be, and the same hereby is, **DENIED**. It is further

ORDERED that the Petitioner's Application for Writ of Habeas Corpus pursuant to 28 U.S.C. §2241 shall be, and the same hereby is, **GRANTED** in part. The BOP is directed to reconsider the Petitioner for CCC placement in accordance with the five factors set forth in 18 U.S.C. §3621(b). It is further

ORDERED that the above-styled action shall be **STRICKEN** from the docket of this Court. It is further

ORDERED that the Clerk shall enter judgment for the Petitioner. It is further

ORDERED that, if a party should desire to appeal the decision of this Court, written notice of appeal must be received by the Clerk of this Court within thirty (30) days from the date of the entry of the Judgment Order, pursuant to Rule 4 of the Federal Rules of Appellate Procedure. The \$5.00 filing fee for the notice of appeal and the \$450.00 docketing fee should also be submitted with the notice of appeal. In the alternative, at the time the notice of appeal is submitted, Petitioner may, in accordance with the provisions of Rule 24(a) of the Federal Rules of Appellate Procedure, seek leave to proceed in forma pauperis from the United States Court of Appeals for the Fourth Circuit.

ENTER: September 25th, 2007

/s/ Robert E. Maxwell
United States District Judge